IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7507 OF 2004

K.L.E.Society, Belgaum
(Karnataka Lingayat Education Society)
through its President
Annappa Kadadi High School
Solapur. ...Petitioner

Vs.

1. Shri Madhukar Pandhari Patil
2. Shri Prakash Pandhari Patil
3. Shri Shrirang Pandhari Patil
4. Shri Bhagwant Dadarao Bhopale ...Respondents

Shri A.A.Kumbhakoni with Shri A.P.Kulkarni for the

Petitioner.

None for Respondent Nos.1 to 3.

Shri S.S.Shah for Respondent No.4.

CORAM: ABHAY S.OKA, J.

DATE OF HEARING OF LAST ARGUMENT : DECEMBER 16, 2004

DATE OF PRONOUNCEMENT OF JUDGMENT: DECEMBER 21,2004.

JUDGMENT :

1. On 14th September 2004, this Court issued notice for final disposal at admission stage. Office noting shows that the Respondent Nos.1 to 4 are duly served with notice. Shri Surel Shah appears for the Respondent No.4.

2. By this Writ Petition under Article 227 of the

Constitution of India, the challenge is to the Judgment and order dated 6th March 2004 passed by the learned II Joint Civil Civil Judge (S.D.), Solapur below Application at Exhibit 147 made by the Petitioner. The Respondent Nos.1 to 3 are the original Plaintiffs. The Respondent No.4 is the original Defendant. The suit is filed by the Respondent Nos.1 to 3 against the Respondent No.4 for specific performance of the alleged oral agreement for sale of the suit property. The case of the Respondent Nos. 1 to 3 is by an oral Agreement made in January 1984, the Respondent No.4 agreed to sell the suit property in their favour. The case of the Petitioner is that by a registered Sale Deed dated 20th June 1995, he purchased the suit property from the Respondent No.4 and others. The suit for specific performance was filed by the Respondent Nos.1 to 3 in the year 2001 without impleading the Petitioner as a party.

3. Therefore, the Petitioner made an Application at Exh.147 in the said suit praying that he be impleaded as a party Defendant. The said Application was opposed by the Respondent Nos.1 to 3 by filing a reply. The said Respondents denied execution of Sale Deed dated 20th June 1995. They contended that they were in possession of the suit property from December 1983. The said Respondents submitted that the Application has been belatedly filed by the Petitioner after their evidence was recorded.

4. The learned Trial Judge relied upon the Judgment of this Court reported in 1995 (1) Mh.L.J. page No.893 (Shamrao Vs. Gurukul Grih Nirman Bhadekaru Malki Sahakari Sanstha Maryadit, Chandrapur and others) and held that the Petitioner being a stranger to the contract which is the subject matter of the suit cannot be impleaded as a party Defendant.

5. Shri Kumbhakoni, the learned Counsel appearing on behalf of the Petitioners contended that the ratio of the Judgment in Shamrao's case has no application in this case. This Court was dealing with a case of a third party who was claiming on the basis of an Agreement for sale executed in his favour by the Defendants in a suit for specific performance. He pointed out that considering the peculiar facts of the said case, this Court held that the Third Party being a stranger to the suit Agreement cannot claim impleadment. Relying upon a Judgment of the Apex Court reported in A.I.R. 1954 S.C.Page No.75 (Durga Prasad and another Vs. Deepchand and others), Shri Kumbhakoni submitted that the Petitioner has become owner of the suit property by a registered Sale Deed executed before the institution of the suit and therefore, if Decree for specific performance is to be passed, the Court will have to direct the Petitioner to execute Sale Deed along with the original Defendant (the Respondent No.4) in favour of the Respondent Nos.1 to 3. He, therefore, submitted that the Petitioner was a necessary and proper party to the suit. He also relied upon another

Judgment of this Court reported in A.I.R. 1972 Bombay page No.148 (Jivanlal Wani Vs. Narayan) in support of his case. Shri Shah appearing for the Respondent No.4 has supported the case of the Petitioner.

6. I have carefully considered the submissions. The learned Single Judge in Shamrao's case has relied upon the Judgment of another learned Single Judge reported in 1973 Mh.L.J. Page No.683 (E.Ajay Kumar Vs. Smt.Tulsabai and another). In paragraph No.9 of the Judgment in the case of E. Ajaykumar, the learned Single Judge held that,

> 9. Now, in the present case, it is a simple suit for specific performance of an agreement to sell certain property. That agreement will have to be established as pleaded by the plaintiff himself. Not only, before the Court can be asked to pass a decree for specific performance, the plaintiff is bound to establish all the conditions that are requisite for completing such a sale transaction. it is implicit in such a controversy that if the evidence indicates or if a plea is raised that there is no title under which such an agreement could have been at all entered into, the suit would fail. That does not mean that

> the court is enjoined to enter upon the questions which are neither pleaded nor are in issue. If the defendant against whom such a suit filed has a defective title but agreement is property enforceable, the plaintiff may choose to take even the defective title in such a suit. Similarly, there may be a title in part with the defendant and that may ultimately pass to the plaintiff. **In neither of these cases a stranger to the agreement and hence to the controversy who claims to be entitled to the property as such can come before the Court either as necessary or proper party.**
> (Emphasis supplied)

In paragraph No.13 he held that,

> "13. The law appears to be clear to indicate that the controversy raised in such a matter is limited to the agreement and cannot be converted into an entirely different controversy by adding parties."

The learned Single Judge concluded in paragraph No.19 that,

19. This may be viewed from another angle. Can it really be said that the stranger to an agreement is concerned with the relief sought by the plaintiff or the defences raised against such specific performance ? **Firstly, he not being a party and being a total stranger, any decision inter-parties would not affect his right.** It follows that there would be, therefore, no prejudice to such a party. **The Court that is being called upon to enforce the agreement is not settling any dispute between the plaintiff and the stranger and as such the presence of such a person is neither necessary nor of any aid to decide upon the controversy.** The decisions relied upon by the learned counsel, on the other hand, indicate that the rule in this respect must be of present and direct interest for the purpose of enabling the Court to order joinder of parties or permit any stranger to step in the litigation via Order 1 Rule 10 of the Code of Civil Procedure. (Emphasis supplied)

The perusal of the Judgment of the learned Single Judge in

Shamrao's case shows that the learned Single Judge has followed the decision in case of E. Ajaykumar.

7. Thus, the view taken by this Court is that even if the title to the defendant in a suit for specific performance is defective but the suit Agreement is properly enforceable the Plaintiff may choose to take even the defective title in such a suit. A third party who is a stranger to the Agreement will not be bound by the decision rendered in the suit for specific performance and such a decision will not affect his rights.

8. If the Respondent Nos.1 to 3 are aware about the execution of the Sale Deed in favour of the Petitioner, the Respondent Nos.1 to 3 have taken a risk by not impleading the Petitioner as a party. If the Respondent Nos.1 to 3 were interested in obtaining a decree for specific performance against the Respondent No.4 and the Petitioner as per the decision of the Apex Court in case of Durga Prasad, the Respondent Nos.1 to 3 ought to have impleaded the Petitioner as a party. However, the question before the Trial Court was whether on the basis of an application made by the Petitioner under Order I Rule 10 (2) of the Code of Civil Procedure, 1908, the Petitioner should be impleaded as a party or not. The Court below has come to the conclusion on the basis of the Judgment of this Court in Shamrao's case that the Petitioner is neither a necessary party nor a proper party to

the suit as the prayer in the suit is for specific performance. In so far as the prayer for specific performance is concerned, same is limited to alleged Agreement between the Respondent Nos.1 to 3 and 4. Even assuming that the Respondent No.4 does not have title or has a defective title, the Petitioner who is claiming to be the owner cannot be said to be necessary or proper party as is a stranger to the agreement. It is obvious that if the decree for specific performance is passed in the suit, the Petitioner's rights will not be affected. I find no error in the Judgment of the Trial Court when the learned Trial Judge followed the decision of this Court in case of Shamrao.

9. However, it appears that the learned Trial Judge overlooked that in the plaint the Respondent Nos.1 to 3 have incorporated another prayer in the alternative and without prejudice to the prayer for specific performance. The said prayer is for declaration that the Respondent Nos.1 to 3 have become owners of the suit property by adverse possession. There is nothing on record to show that the Respondent Nos.1 to 3 have given up the said prayer in the plaint. By the said prayer, the Respondent Nos.1 to 3 are seeking declaration of ownership by adverse possession. The Petitioner is claiming to be the owner of the suit property on the basis of the Sale Deed executed by the Respondent No.4 and others. In so far as the prayer for specific performance is concerned, the subject matter of the suit is the suit

Agreement in which the Petitioner cannot be said to have direct interest. However, so far as the prayer for declaration of ownership is concerned, the Petitioner has a direct interest as he is claiming to be the owner on the basis of the sale deed executed in his favour. Thus, in so far as the prayer made in the alternative for declaration is concerned, the Petitioner becomes a necessary party. The Petitioner is a necessary party for considering the said prayer as the Respondent Nos.1 to 3 are claiming title by adverse possession. The presence of the Petitioner who is claiming to be the real owner is necessary in order to enable the Trial Court to adjudicate effectually and completely on the issue of ownership. The perusal of the impugned order shows that the learned Trial Judge has overlooked the said prayer made in the alternative. In so far as the said prayer is concerned, the Petitioner is certainly a necessary party. Therefore, the impugned order deserves to be quashed and set aside.

10. Hence I pass the following order :

(i) Impugned Judgment and Order dated 6th March 2004 is quashed and set aside.

ii) The Application at Exh.147 is allowed. The Respondent Nos.1 to 3 are directed to carry out necessary amendment to the plaint within a period of four weeks from production of

authenticated copy of this order.

iii) If the Respondent Nos.1 to 3 fail to amend the plaint within the stipulated time, the learned Trial Judge will permit the Petitioner to carry out the necessary amendment to the plaint.

iv) Rule is made absolute in above terms with no order as to costs.

v) Parties to act upon an authenticated copy of this order.

Judge.